ST. LOUIS
READING ROOM
PUBLIC LIBRARY

Central Law Journal

ESTABLISHED JANUARY, 1874.

Vol. 73 ST. LOUIS, AUGUST 11, 1911. No. 6

Public School Library
Cor. Ninth and Locust

A TREATISE ON

American Advocacy

—BY—

ALEXANDER H. ROBBINS.

EDITOR OF THE CENTRAL LAW JOURNAL.

The object of the advocate is to reach the highest eminence of his profession. The qualities that go to make up his success cannot be learned from ordinary law text books; they come to him who flirts with human nature, who communes with the great exemplars of the legal profession. To assist the practicing lawyer in this difficult art is the purpose of this volume.

THE WORK TREATS IN PART OF:

PREPARATION FOR TRIAL.
OPENING PLAINTIFF'S CASE.
OPENING DEFENDANT'S CASE.
EXAMINATION IN CHIEF.
CROSS-EXAMINATION.
RE-EXAMINATION.
SUMMING UP DEFENDANT'S CASE.
THE REPLY.
CONDUCT OF A CRIMINAL PROSECUTION.
COMPENSATION AND ADVERTISING.
LEGAL ETHICS.
CONDUCT OF A DEFENSE IN A CRIMINAL TRIAL.
CLASSES OF WITNESSES.
TACT AND TACTICS.
BRIEFS, ARGUMENTS AND METHODS OF SPEAKING.

AMERICAN ADVOCACY is in one volume, 8vo., contains 311 pages. Price, bound in Cloth, $2.00, or in Law Sheep, $2.50. Sent prepaid on receipt of amount.

PUBLISHED AND FOR SALE BY

Central Law Journal Company,

420 MARKET STREET, ... ST. LOUIS, MO.

A Treatise upon the Complex System of Constitutional Jurisprudence by which this Country is Governed

THE CONSTITUTIONAL LAW OF THE UNITED STATES

By W. W. WILLOUGHBY, Ph. D.

Professor of Political Science, Johns Hopkins University; Managing-Editor American Political Science Review; Author of "The American Constitutional System," "The Supreme Court of the United States; Its Place and Influence in our Constitutional System," "The Nature of the State," "Rights and Duties of American Citizenship," etc.

IN these two volumes is set forth in philosophical form the Constitutional Jurisprudence of the United States as developed during the 120 years since the adoption of the Constitution. The author has not sought to duplicate the work of digests by collating various constitutional decisions of the Federal Courts, but by a careful and critical study of these decisions, and of the processes of legal reasoning underlying them, *has stated the fundamental principles of American public law in so clear, so complete and so systematic a form that the work will, it is confidently believed, be at once received as the standard authority upon the complex system of Constitutional Jurisprudence by which this country is governed.*

Especial attention is devoted to those constitutional provisions and principles, the possible implications of which are not yet certainly determined, and which must be relied upon to support the legislative and executive action which may be expected within the near future.

Thus particular care is given to the discussion of such subjects as INTERSTATE COMMERCE, TAXATION, EXECUTIVE AND ADMINISTRATIVE POWERS AND DUE PROCESS OF LAW. Because of this systematic arrangement and its discussion of fundamental principles, *the work will be indispensable not only to practicing lawyers but to students of the law as well.*

PROF. WILLOUGHBY is the author of several authoritative treatises upon political and constitutional subjects, is the editor of the "American Political Science Review," and head of the department of Political Science at the Johns Hopkins University.

The work contains a full index and analytical table of contents and table of cases, giving references to the Supreme Court Reporter, the Lawyers' Co-op. Edition of the U. S. Reports, as well as the Official Reports of the U. S. Supreme Court.

Willoughby on the Constitution is in two large octavo volumes, handsomely bound in canvas. *Price, $12.00 net, delivered.*

BAKER-VOORHIS & CO.

Law Book Publishers

45-47 JOHN STREET :: :: NEW YORK

Central Law Journal.

ST. LOUIS, MO., AUGUST 11, 1911.

THE RIGHT OF THE STATE TO FIX INTRASTATE RATES SO FAR AS THE COMMERCE CLAUSE IS CONCERNED.

Since the decision by Sanborn, C. J., in Shepard v. Northern Pac. Ry. Co., 184 Fed. 765, was rendered, two other rate cases have been decided. Louisville & N. R. Co. v. Siler, 186 *id.* 176; In re Arkansas Rate Cases, 187 *id.* 290.

In the former of these two cases the view of three judges sitting in the Eastern District of Kentucky was against enjoining the enforcement of the intrastate rate, and in the latter there was injunction, by Judge Trieber, of Eastern District of Arkansas, solely upon the ground that the prescribed rates were non-compensatory and their enforcement, therefore, a taking of property without due process of law.

We expressed our dissent from the ruling of Judge Sanborn in the Shepard case, in 72 Cent. L. J., at page 334, and again at page 351. Just as we were concluding that Judge Trieber was enforcing most admirably the correctness of our view, we discover him, in what appeared to us "a most lame and impotent conclusion," announcing his unwillingness to say he disagreed with Judge Sanborn.

Before we were forgetting that we had rubbed our eyes in astonishment at this, we read, that he is in agreement with the conclusions in the Siler case.

If we may not be considered irreverent, we will say that there came upon our tongue the observation of a critic upon a line in the poetry of James Thompson.

The poet said:

"O Sophonisba, Sophonisba O."

And the critic said:

"O Jimmy Thompson, Jimmy Thompson O."

The critic got the poet's meter. As yet we cannot say that, upon the question referred to, we have gotten the judge's measure.

We may, however, show here how he seemed to proceed *pari passu* with what was said in the Siler case and contrast both with announcements in the Shepard case. Our labor is not disinterested, because we wish to array whatever we may against the Shepard case.

In the Siler case it was claimed that the state had no right to prescribe a local rate that would interfere with a through rate, and this contention was expressly overruled, Justice Peckham being quoted as saying: "In thus fixing the interstate rate, Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand, the state by such a statute regulates the local rate, but that it has the right to do. Congress does not, directly or indirectly, interfere with local rates by adopting their sum in the interstate rate." See 184 U. S. 42.

The Siler case said there was nothing in the opinion that militated against what was said by Justice Brewer in his dissent as follows: "I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the Legislature of Kentucky may see fit to enforce, by simply saying that outside of the state it somewhere touches a competitive point, and is forced to reduce its interstate rates by reason of competition there existing."

This opinion recalls what was said by Chief Justice Marshall in Gibbons v. Ogden, as follows: "It is not intended to say that those words comprehend that commerce which is completely internal which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states."

In 207 U. S. 463, we find it stated that Justice, now Chief Justice, White emphasizes this doctrine and that Justice Miller, in Wabash Ry. Co. v. Illinois, 118 U. S. 557, said: "In regard to the business of common carriers limited to points within a single state, that state has the legislative

power to establish the rates of compensation for such carriage."

Particularly is to be noticed in the Siler case what is said about the intent of the commerce act. The court says: "It is expressly provided in each of the interstate commerce acts, that the act shall not apply to the transportation of passengers or property 'wholly within one state and not shipped to or from a foreign country from or to any state or territory.'"

Again it is said: "Whether Congress has the power to forbid indirect interference with commerce among the states we need not consider, for we do not discover any attempt on its part to exercise such a power."

Now let us turn to the opinion in the Arkansas rate cases.

Judge Trieber quotes Justice Field in treating of the right of regulation of commerce, saying it was never intended to prevent the states from legislating in a way that might "indirectly affect the commerce of the country."

Again an extract is made from Hennington v. Georgia, 163 U. S. 299, where it was announced that legislation within the police powers was not forbidden, though it may by its "necessary operation affect to some extent and for a limited time the conduct of commerce among the states."

As to this principle, the judge cites a full half-page of cases, coming down as late as Feb. 20th, 1911. He also cites the cases we instanced above as found cited in the Siler case.

The judge also makes this statement: "Another matter not to be overlooked is, if the state is without power to regulate purely intrastate transportation, because it affects interstate commerce indirectly, where is it vested? Congress is clearly without power to do so, and, of course, it cannot delegate to a commission a power it does not of itself possess. * * * If complainant's contention is correct, transportation, so far as exclusively internal commerce is concerned, is beyond all control, either from the state or the national government."

What do we find in the Shepard case?

Primarily we find the judge in that case declaring that the proviso in the commerce act, which showed to the judges in the Siler case that Congress did not intend to forbid any indirect interference with interstate commerce, was inserted merely out of abundance of caution. Congress meant, said Judge Sanborne, "to make sure that the broad terms of the act did not go beyond the power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce."

This, at least, presumes that Congress has the power to forbid indirect interference by a state with interstate commerce. But the Siler case says: "Whether Congress has the power to forbid indirect interference with commerce among the states, we need not consider, for we do not discover any attempt on its part to exercise such power."

Here is a doubt about congressional power and an assertion of there being no attempt to exercise the doubtful power. Judge Sanborn ignores the doubt and disagrees utterly as to the intent of the act of Congress.

But Judge Trieber seems to us to plant himself upon the proposition that it is beyond the power of Congress to repress indirect interference by the states with interstate commerce.

Furthermore, in the Shepard case, there was nothing more in the character of interference than in the Siler case.

In both it was claimed that local rates interfered with through rates.

Justice Brewer is quoted in the Siler case as characterizing any contention that local rates were invalidated, because outside of the state they force a reduction of interstate rates, as unworthy of serious consideration.

It was looked upon by the three judges in the Siler case as an indirect interference, which the act of commerce did not pretend to touch.

If Judge Sanborn agrees at all with that, his decision has not been understood. He says: "The reduction of local rates does not interfere with interstate rates 'as a matter of law,' yet it may do so as a matter of fact."

The "matter of fact" seemed not material in the Siler case, as the "matter of law" was thought to control. In the Shepard case the "matter of fact" prevails. But it bore more heavily, though it cannot be said to have borne less indirectly, in the Shepard case.

The Shepard opinion seems like the *avant courier* of the Standard Oil decision, and considering that the judge who wrote it is the same judge that wrote the opinion in the Standard Oil case that was affirmed, one is tempted to go back to read between the lines to discover something like what the chief justice says about "the rule of reason."

If there is any greater triumph in judicial legislation in the one case than the other, we would have to reflect awhile before awarding the palm.

NOTES OF IMPORTANT DECISIONS

CONSTITUTIONAL LAW—RECALL AS APPLIED TO MUNICIPAL OFFICERS UNDER THE GUARANTY OF A REPUBLICAN FORM OF GOVERNMENT.—In Bonner v. Belsterling, 137 S. W. 1154, the Texas Court of Civil Appeals held that article 4, section 4, of the federal constitution guaranteeing to a state a republican form of government "was a guaranty to the state at large and not to the systems of local government provided by the states for the regulation of their municipalities."

This case was decided on May 27th, 1911, and rehearing denied on May 30th, 1911, and as early as June 23d, 1911, it was again decided by Texas Supreme Court, affirming the judgment rendered by the Court of Civil Appeals, See 138 S. W. 571.

In passing we may say, that this promptness looks very much like the expedition we have heard praised so highly in English practice.

It is also to be noted, that the suit thus terminated was filed sometime since April 4th, 1911, as it is a proceeding against the elect at an election held on the last named day, the district court sustaining a demurrer to the petition and appeal being taken therefrom.

The Supreme Court in affirming the judgments of the lower courts, again treats the contention that recall is opposed to the constitutional guarantee of a republican form of government. It does not, however, avoid the question, in its wider aspect, as was done by the Court of Civil Appeals.

The Supreme Court says: "That the city of Dallas is strictly republican in form of government is not questioned, if the recall be eliminated. But it is said that with the recall provision, it ceases to be republican. How this can be is not made plain to us. With the recall provision in the charter, the people are still invested with the sovereign power of the municipality and they are intrusted with the selection of their representatives who are to administer the city government. It occurs to us that there is a greater degree of sovereignty with the people with the recall of their representatives than would otherwise be the case; in fact the right of recall asserts in a larger degree the right of representation; that is, representation in fact of the will of the people." One judge expresses his dissent but as the court is on the eve of adjournment he states generally he thinks the provision opposed to several provisions of the Texas Constitution and that it affects our form of government. He proposes filing his views later on.

We do not know how far the views of the Texas court as to initiative and referendum, under the guarantee spoken of, may be said to be indicated. To our mind it might reasonably be claimed, that any amount of recall might be admissible under that guarantee, while legislation by initiative and referendum might be excluded.

Recall does not invade, as far as we can perceive, the system of government (conceded to be republican in form) which preserves inviolate the three great departments.

The federal constitution was for states with these departmental features inhering in their very fibre, and it is quite inconceivable to our mind, that the guarantee was contemplated to raise any discussion of a philological character.

Behold a republic and a confederation of republics, the constitution was saying, and such it is the purpose of this constitution to preserve unimpaired.

The Texas Supreme Court quotes from Mr. Jefferson that: "It must be acknowledged that the term 'republic' is of very vague application in every language," and that "we may say with truth and meaning that governments are more or less republican as they have more or less

of the element of popular election and control in their composition."

Let us grant all of this, but the very fact that "the term 'republic' is of very vague application in every language" either lends force to the presumption that the phrase "republican form of government" was intended to have definite application, or that vague phrase would seem unworthy of use by the framers of a great instrument of civil and political liberty.

JUDGMENT — DISTINCTION BETWEEN VOID AND ERRONEOUS JUDGMENT IN COLLATERAL ATTACK.—The case of United States v. Rothstein, 187 Fed. 268, Seventh Circuit Court of Appeals, presents something of a puzzle, whose solution seems not to have been demonstrated, by the opinion, very clearly.

It appears that Rothstein was convicted in December, 1908, under the harboring provision of the immigration act. In April, 1909, the Supreme Court declared this provision unconstitutional. In July, 1909, at a subsequent term of the court, in which a conviction under a plea of *nolo contendere* was adjudged. Rothstein applied to have the judgment of conviction set aside, and he be declared entitled to restitution of what had been paid as a fine. He then brought suit in the district court of claims to enforce his claim of restitution. Judgment was rendered in his favor, and the government appealed.

The government's contention was that the judgment of conviction was not a void judgment, because the question of the constitutionality of the act was involved and holding it was constitutional was merely an error of law, which being unappealed from was final."

While the Court of Appeals appears to concede this proposition, it yet affirms the judgment in Rothstein's favor, because its resistance of the judgment upon which the suit of Rothstein is based is declared a collateral attack on that judgment.

The position is not clearly satisfying. In the case of the judgment of conviction of Rothstein there was regular procedure as in the prosecution of a crime. In that of the order or judgment on which the suit for restitution is based, there is action under a rule granting jurisdiction where a judgment was void. If there was no void judgment the right to lay an attack never occurred, no matter how mistakenly any court may have otherwise supposed.

The court says: "Surely the government will not insist that the jurisdiction of the District Court, as a criminal court, being the organism provided by law and clothed with the duty of hearing the parties' contentions respecting the disposition to be made of the motion, was dependent upon its giving an unquestionably correct decision." We rather think, that if one files a motion, which on its face shows a court has no power to consider it, no court can vitalize it by an erroneous ruling. A judgment absolutely void for want of jurisdiction may be attacked anywhere and everywhere.

TARIFF LAWS FROM THE CONSTITUTIONAL STANDPOINT.

The lawyer who would affirm that protective tariff laws are unconstitutional would probably be laughed at if he made the declaration in a company of lawyers. He would be told that protective duties were adopted by the United States in the earliest years of its history; that in 1792 Alexander Hamilton strongly advocated protection in his report on manufactures; that the first tariff act was passed in the same year as the constitution was adopted and "was protective in intention and spirit;" that before the adoption of the constitution Massachusetts and Pennsylvania had imposed protective duties; that protection to home manufactures was a cardinal feature of the mercantile system which dominated the commercial policy of England and Europe for centuries, and that neither in the common law, nor in any of the great constitutional charters of England is there a suggestion that to protect domestic industries against foreign competitors was ever regarded as an infringement of individual liberty,[1] or as being anything but

(1) As to the early tariff laws of the United States, see Taussig Tariff History of the United States, Ch. 2. Prof. Stimson regards Magna Carta and certain other ancient charters of England as having made more or less specific provisions for the freedom of trade. "Cap. 33 Magna Carta providing for the destruction of all weirs or impediments to navigation early suggests the general freedom of trade under the English Constitution; so Cap. 41 providing for the liberty of merchants, and prohibiting any evil tolls other than the ancient and allowed customs; and the Charter of Henry III. Cap 30, amplifies this. * * * While finally the Charter of John to London, grants them to have 'well and in peace freely, quietly, and in full all its liberties which they were used to have up to that time as well in the Town of London as outside, by sea or by land and in all other places." Federal And State Constitutions Of The United States. Page 31-2.

ST. LOUIS
READING ROOM
PUBLIC LIBRARY

a proper function of government. If one should, notwithstanding these admitted facts, undertake to maintain his assertion by serious argument he would not long look in vain for facts and principles to sustain his position. He would, indeed, have to free himself from the encumbrance of certain rules of construction which have been given a more or less canonical authority by the supreme court in their application to the constitution. But he would by no means be driven to that last refuge of the practical lawyer, the contention, namely, "the law is whatever is boldly asserted and plausibly maintained." He could have the satisfaction of feeling that his arguments rested on the solid basis of individual liberty and sound commercial and political policy; and that however much the practice of the United States or of Great Britain might be opposed to his contention, it was nevertheless supported by broad principles, which both governments recognize, and which have been affirmed and reaffirmed repeatedly by the Supreme Court of the United States.

In the first place, admitting that the lawyer must pay respect and deference to the practice of the political department of government, and that the courts should seldom undertake to declare that practice inconsistent with the constitution[2] as over it, should be observed that if the practice of governments were a sufficient warrant for the continuance of that practice, the abolition of slavery would never have been justified. While the framers of the constitution did not regard protective tariffs as forbidden by it, neither did they regard it as prohibiting slavery. It is, of course, clear enough that the slavery question was in the minds of the framers of the constitution,[2] but they regarded its continuance as consistent with constitutional provisions, and perhaps the same is true of their attitude towards protective tariffs. If the latter were considered at all, undoubtedly they were regarded as constitutional. But it is clear enough that the mere lapse of time and the changes which it brings, may make unconstitutional that which originally was unquestionably valid. Slavery, for example, originally confined to negroes or men of black blood only, might in time by the intermarriage of the races, have come to include all the inhabitants of the country, such intermarriage resulting in a mixed race, all of its members being tainted with black blood; so that by operation of law and lapse of time slavery might have come to be the universal status, an impossible condition, in fact, whatever it might be in law; for the institution of slavery cannot exist without both slaves and masters. A result almost the antithesis of this might follow as the consequence of protective tariffs. Designed originally to protect infant industries, they might be continued until these infants had not only multiplied and grown, intermarried and consolidated, but until they had organized under one supreme control consisting of but a few men, in whose interests the protective tariffs would operate. And in the United States a change of this sort would materially affect the laws as viewed from the constitutional standpoint. Protection under such circumstances would be manifestly a misnomer, as there could be no pretense that the owners of the industries would be more able to operate them on account of the duty, or that anyone save the owners would be benefited by the duty. If the tariff had any effect at all, it would be simply to increase the price to the consumers of the commodities against which it was levied. In other words, it would be a clearer case than it now is of taking money out of the pockets of the mass of the people and giving it to a few individuals; and it would serve no other purpose.

Bounty laws have this effect. These laws have been held unconstitutional by the supreme court of Michigan, although they also have the effect of stimulating the industries aided. In the case of Michigan

(2) On so-called political questions the rule is that the court will not interfere at all. Luther v. Borden, 48 U. S. 17; 12 L. ed. 581. But it is not always clear as to what constitutes a political question. Taylor v. Beckham, 178 U. S. 548; 44 L. ed. 1187.

Sugar Company v. Auditor General Dix,[3] it was held that the bounty for the manufacture of beet sugar, given by the Public Acts of 1897, art. No. 48, was unconstitutional[3] as a taking of the property of the tax-payers for a use not public, and because it took the property of one citizen and turned it over to another, it was void irrespective of express constitutional provisions. The court quoted from Mr. Justice Cooley's opinion in the case of People v. Salem, 20 Mich. 452, as follows: "But it is not in the power of the state in my opinion under the name of a bounty, or under any other cover or subterfuge to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law, of which this is the real nature, is void, whatever may be the pretense on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions stands upon different footing altogether. Nor have I any occasion to question the right to pay rewards for the destruction of wild beasts, and other public pests; a provision of this character being a mere police regulation. But the discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandise or milling, printing or railroading, is not legitimate legislation, and is an evasion of that equality of right and privilege, which is a maxim in state government. When the door is once opened to it there is no line at which we can stop and say with confidence, that thus far we may go with safety and propriety and no farther. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industries of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business which cannot stand alone. Moreover, it is not a weak industry only that can give plausible reasons for public aid: When the state enters upon the business of subsidies we shall not fail to discover that the strong and powerful interests are those most likely to control legislation and that the weaker will be taxed to enhance the profits of the stronger."

(3) 124 Mich. 674, 56 L. R. A. 329.

The reasoning of Judge Cooley applies with equal force against a merely protective tariff law. A law which protects, but produces no revenue, operates as a tax upon the consumer for the benefit of the producer, and as nothing else. Clearly, it belongs to the same class as bounty laws. Both make favorites of particular businesses. Both take the property of one class of individuals, and transfer it to another class of individuals, and the pretext for doing this is the same in both cases, the pretext namely, that by so doing the welfare of the state or nation is advanced, as the progress of the industries, aided by protection or the bounty, means the progress of the whole community. But whether for this end an industry be aided by protection or a bounty, the reply is the same: "The discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandise or milling, printing or railroading, is not legitimate legislation, and is an evasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it there is no line at which we can stop and say with confidence, thus far we may go with safety and propriety, and no farther. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. * * * * * But * * * the state can have no favorites. Its business is to protect the

industries of all and give all the benefit of equal laws."

Is the case different in principle where a protective law also produces revenue? Does the incidental revenue legitimize the partiality of the state to the protected industry? Would a bounty law otherwise void be rendered legal, if the state retained a portion of the fund for governmental expenses instead of handing it all over to the industry for the benefit of which the appropriation was made? Clearly not. A law must be tested by the purpose and intent of the legislature as well as by its effects. A law designed for revenue is one thing, and a law designed for the protection of an industry is distinctly a different thing. The object of the one is public, of the other private. Where the purpose of the legislature is to give protection, it cannot be said that the main purpose of the law is revenue. An act must be tested by its main purpose. To attempt to sustain it because of some secondary purpose or incidental effect would be regarded as subterfuge by the courts. In so far as the law produced revenue, it would fail of its main object when that object was protection, and it would be a strange thing to allege in support of a law the fact that it did not accomplish the purpose of its framers.

Protective tariff laws are therefore as vulnerable as bounty laws, and in the same respect. But they are vulnerable also in another quarter. They may be attacked because of their interference with individual liberty with the right of free trade. They limit the right of the individual to trade with foreigners. No doubt nations have at all times asserted this right. But as Herbert Spencer has pointed out its legitimate assertion must be kept within the requirements of national defence. "Where there is good evidence that freedom of exchange would endanger national defence, it may be rightly hindered.

"This is a limitation of the right which, in stages characterized by permanent militancy, is obviously needful. Societies in chronic antagonism with other societies must be self-sufficing in their industrial arrangements. During the early feudal period in France, 'on rural estates the most diverse trades were often exercised simultaneously;' and 'the castles made almost all the articles used in them.' The difficulty of communication, the risk of loss of goods in transit, and the dangers arising from perpetual feuds, made it requisite that the essential commodities should be produced at home. That which held of these small social groups, has held of larger social groups; and international freedom of exchange has therefore been greatly restricted. The outcry against being dependent on foreigners, which was common during the anti-corn law agitation, was not without some justification; since it is only during well-assured peace that a nation may without risk buy a large part of its food abroad, instead of growing it. * * * * * *

"Interference with the liberty to buy and sell for other reasons than that just recognized as valid, is a trespass, by whatever agency effected. Those who have been allowed to call themselves "protectionsts," should be called aggressionists; since forbidding A to buy of B, and forcing him to buy of C (usually on worse terms), is clearly a trespass on that right of free exchange which we have seen to be a corollary from the law of equal freedom."[4]

Spencer was contending for rights quite irrespective of their recognition in any written laws or constitution. But it is manifest that he applies the same principles as the courts of the United States have applied in numberless cases to sustain individual liberty. In the case of Crandall v. Nevada,[5] the supreme court uses language which might easily be construed to assert not merely the right of free locomotion and freedom to trade within the sovereignty of the United States, but also the right of foreign trade, as inherent individual rights. Referring to the American citizen, the court, by Mr. Justice Miller,

(4) Justice, Part 4, of Ethics Synthetic Philosophy, page 131-2.

(5) 6 Wall. 35, 73 U. S. 18 L. ed. 745.

says: "He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions, he has a right to free access to its sea-ports. through which all the operations of foreign trade and commerce are conducted. * * *"

Of course, it is not contended in this article that any tariff laws are unconstitutional in the sense that would authorize the courts to disregard them. If their validity was drawn in question the courts would undoubtedly sustain them, if not on any other ground, then at least on the ground that they had so long operated as valid, that they involved questions which had been decided by the people at the polls which were essentially political questions. Their constitutionality was boldly desired by John C. Calhoun and his followers, in the days when they preached the doctrine of nullification and they declared that South Carolina had the right to nullify the protective tariff acts, regardless of the view which the United States Supreme Court might take of their validity, and the Tariff Act of 1832 was formally declared void by the Legislature of South Carolina. But no one now contends for the doctrine of nullification, or that "political questions" should be determined by the courts. The contention here made, is that such laws are a species of class legislation of a very pernicious type, and that they involve a serious infringement of individual rights.

It should be added in view of the quotation from Judge Cooley's opinion that bounty laws are unconstitutional, that the Supreme Court of the United States has taken a different view of that question.[6] Nevertheless, the reasoning of Judge Cooley seems the more conclusive.

W. A. COUTTS.

Sault Ste. Marie, Ont.,
Nov. 25th, 1910.

(6) Allen v. Smith, 173 U. S. 389; 43 L. ed. 741; United States v. Realty Company, 163 U. S. 427, 41 L. ed. 215.

CORPORATIONS—SALE OF ASSETS.

MABEN v. GULF COKE & COAL CO. et al.

Supreme Court of Alabama, May 9, 1911.

55 So. 607.

Where a private corporation was authorized, among other purposes, to rent or purchase mineral lands and to sell and lease the same, a majority of its stockholders had power to authorize a sale of all its lands and minerals which constituted all its property, over the protest of minority stockholders, who, in the absence of fraud, breach of duty, or bad faith, were not entitled to invalidate such sale, because the corporation was thereby denuded of all its property.

MAYFIELD, J.: This bill was filed by appellant against appellees, seeking to have a certain conveyance, executed by the Gulf Coke & Coal Company to the respondent, Hanson, as trustee for the Empire Land Company, conveying all the lands and minerals belonging to the said Gulf Coke & Coal Company, decreed to be null and void and of no effect, and to have the legal title to the lands and minerals conveyed thereby declared to be in the said Gulf Coke & Coal Company, and to have the said company return to the said Hanson all the consideration received by it from the attempted sale. The complainant filed the bill as a stockholder of the Gulf Coke & Coal Company.

The equity of the bill is sought to be supported upon the contention that the lands conveyed constituted the entire holdings of the corporation (Gulf Coke & Coal Company) of which the complainant was a stockholder, and that the corporation was thereby denuded of all of its property and deprived of all means of carrying out the purposes for which it was organized; that the sale was not for the purpose of reinvesting the funds, but to terminate the existence of the corporation in that way, which was claimed to be in contravention of the laws made and provided in such cases.

(1) The bill alleges that all of the members of the board of directors, except one, voted in favor of the sale and conveyance of the lands to Hanson as trustee, and that it would therefore be useless to appeal to the board of directors of the corporation for the redress sought by the bill. The bill avers that on July 5, 1906, the board of directors of the Gulf Coke & Coal Company passed resolutions authorizing and providing for a sale of all the lands and mineral holdings of the said company to Hanson, in consummation of the contract theretofore made to that end. All of the stockholders, except the complainant and L. B. and J. C. Musgrove, voted their stock in favor of the

sale; 6,876 shares being voted in favor of the sale, and 2,203 shares against it, and complainant owning 138 shares of those voted against the sale. The complainant, at the meeting of the stockholders, protested against the sale.

Among the powers and purposes of the corporation was that to rent or purchase known mineral lands and to sell or lease them. The corporation was organized under the general statutes providing for the organization of mining and manufacturing corporations, on December 22, 1887. It was given many powers besides those above mentioned.

The respondent, the Gulf Coke & Coal Company, demurred to the bill, assigned grounds too numerous to be mentioned; but among them was the general demurrer that there was no equity in the bill. The cause was heard on this demurrer, which was sustained by the chancellor, and from his decree thereon this appeal is prosecuted.

The proposition of law insisted upon by the appellant, and the theory upon which the bill was filed, is that a solvent corporation which is a going concern cannot, against the objection of a single stockholder, sell its entire property and thereby denude itself of the means and powers necessary to carry on the purposes for which it was organized.

We think the law upon this subject applicable to a corporation like the one in question, and to transactions or sales like the one involved in this suit, has not been better stated by any of the authorities than by that great justice, Bigelow, of the Supreme Court of Massachusetts, in the case of Treadwell v. Salisbury Manufacturing Company, 7 Gray, 393, s. c. 66 Am. Dec. 499. This case has been followed, if not quoted literally, by many text-writers on the subject. It is sustained by both the great weight of authority and the majority of the adjudicated cases. The law is so well stated in that decision, and is so in accord with our views on the subject in this case, that we shall quote it at length:

"We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. Angell & Ames on Corp. § 127 et seq.; 2 Kent's Com. (6th Ed.) 280; Mayor, etc., of Colchester v. Lowton, 1 Ves. & B. 226, 244; Binney's Case, 2 Bland (Md.) 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; but also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained fom alienating their property, and compelled to appropriate it to specific uses, by mandamus, or other process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the Legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property."

There are many recent cases to the same effect, to-wit: "A corporation, while solvent and a going concern, holds property like an individual, free from lien or trust in behalf of its general creditors, and may dispose of the same as it deems best, subject to the provisions of its charter and those other restraints upon the conveyance of property which the law imposes alike on corporations and individuals." New Hampshire Savings Bank v. Richey, 121 Fed. 956, 58 C. C. A. 294. "A corporation organized under the laws of West Virginia has power, under the Code of West Virginia 1899, c. 53, § 56, to sell and transfer all of its property and discontinue its business by the action of the holders of a majority of the stock, taken at a general stockholders' meeting." Metcalf v. American School Furniture Co. (C. C.) 122 Fed. 115. "A private corporation, unless restrained by statute, may legitimately deal with its property as an individual deals with his." Levering v. Bimel, 146 Ind. 545, 45 N. E. 775. "Where the majority members of a corporation have sold its entire property, the sale will not be set aside at the instance of a minority stockholder on the sole ground that the corporation was doing a fairly good business, and that some of the stockholders did not consent to the sale." Tanner v. Lindell Ry. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534.

We think that the cases cited and relied upon by the appellant are not applicable to

the case under consideration. The New Jersey case of Kean v. Johnson, 9 N. J. Eq. 402, is distinguished from this case upon two grounds pointed out by Justice Bigelow in the Massachusetts case quoted from above. The New Jersey case involved a sale by a public service corporation of all its property and franchise rights, and also involved the construction of a New Jersey statute, which the court in that case held to expressly prohibit such sale without the consent of all the stockholders. This case is also distinguishable from the line of cases shown by the note in 79 Am. Dec. 424, relied upon by appellant. Those cases involved the rights and powers of two or more corporations to consolidate without the assent of all the stockholders. This it was held, could not be done in the absence of a statute providing for such consolidation; and it was also held that stockholders could not be compelled, in this manner, to invest their capital in other corporations against their protest, and thus be required by other stockholders to embark in new and different enterprises from those undertaken by the original corporation in which they had invested their money. The line of cases referred to hold that such consolidation might be authorized by the Legislature, provided compensation be made to the dissenting stockholders.

So far as appears from the record in this case, the Gulf Coke & Coal Company had never engaged in the business of mining or manufacturing, though authorized so to do under its charter. The only business shown to have been carried on by it during its lifetime of more than 20 years was the buying and selling of real estate. This being true, we can see no reason why it could not make the sale of its lands in question. It must be remembered that there was no attempt to allege fraud, duress, or overreaching on the part of the majority stockholders, directors, or other officers of the corporation. The equity of the bill seems to rest solely upon the lack of authority of the majority of the stockholders and directors to make a sale of the company's lands.

Under the facts as shown by this bill, and in the absence of allegation of violation of the charter powers of the corporation, or of fraud, neglect, breach of duty, or of bad faith, we find no ground upon which to rest the equity of this bill. A court of chancery should not usurp the direction of a private corporation at the instance of a man whose only complaint is one against the acts of the managers and of the majority of the stockholders, done in good faith, and which are authorized by its charter powers. Smith v. Prattville Co., 29 Ala. 503; Tuscaloosa Mfg. Co. v. Cox, 68 Ala. 71.

(2) The sale of the lands in question would not have the effect of terminating or annihilating the corporation. A corporation may continue to exist after all its property is gone. It was not a transfer of its corporate powers or of its franchise rights, if such it had. The particular property sold, though it was on the land owned by the corporation under its charter powers as shown by the bill, was not at all essential to the existence of the corporation. Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300. Mr. Thompson, in his work on Corporations, vol. 3 (2d Ed.) § 2415, says: "A private corporation has power to sell and dispose of all its property, except its franchise of existence, without express authority from the Legislature." In section 2417 of the same book, he says: "A rule of general application is that a corporation of a purely private character, and one which owes no special duty to the public, when the exigencies of his business require it, or when the circumstances are such that it can no longer continue the business with profit, may sell and dispose of all its property, pay its debts, divide the remaining assets, and wind up the affairs of the corporation."

For these reasons, and others which might be assigned, we are of the opinion that the decree of the chancellor is correct and should be affirmed.

Affirmed.

SIMPSON, McCLELLAN, and SOMERVILLE, JJ., concur.

NOTE.—*Validity of Sale of Assets Denuding a Corporation of its Right to Carry On Business without Assent of all of its Stockholders.*—We have examined one other case besides those cited by the opinion in the principal case, and they seem to be against that opinion or not applicable to the question before the court. These cases follow: In Hoag v. Edwards, 124 N. Y. Supp. 1035, 69 Misc. Rep. 237, the facts show that a corporation was organized to purchase and did purchase a large tract of land, near a city to be cut up into building lots and sold. It bought on a rising market and soon afterwards the boom collapsed and the market for such lots disappeared. Some twenty years later all of the stockholders except one agreed to sell the tract to a purchaser assuming to pay the liens on the property, amounting to about one-sixth of the original purchase price. The corporation's charter ran only for ten years.

The dissenting stockholder, owning about one-eighth of the stock, sued the directors for damages, claiming that the property was unlawfully sold as a whole, and not held for sale as lots according to the corporate purpose.

The court said: "It may be said that at common law neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going prosperous

ST. LOUIS PUBLIC LIBRARY READING ROOM

corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder. This doctrine is firmly established by the authority of adjudicated cases and rests upon the soundest principles. But, upon the facts found in the case before us, we see no reason to doubt, that the vote of the majority of the stockholders for the sale of the corporate property, and the closing of the business of the corporation was justified by the condition of their affairs. Without available capital and without the means of procuring it, and with their *de jure* corporate existence at an end, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, no rights of creditors interfering, it was in furtherance of the purposes of the corporation to pay their debts and close their affairs on terms deemed most advantageous to them."

The case of New Hampshire Savings Bank v. Richey, *supra*, did not involve any question of sale against the dissent of a stockholder, for there the stockholders were all of one mind. The suit, in which the quoted language was used, was brought by a creditor endeavoring to obtain a judgment against a purchaser and the selling stockholders.

The case of Metcalf v. American School Furniture Co., *supra*, was decided upon a statute which provided that: "The stockholders may at any time in general meeting resolve to discontinue the business of the corporation, the majority of the capital stock being present and voted in favor of such discontinuance." This being done, the assets and property that may remain over and above debts and liabilities is to be divided.

On that the court remarked that: "The trend of the decisions is to the effect that where the charter and by-laws of a corporation, and the statute under which it is created, vest in the stockholders a right of sale of the corporate properties and discontinuance of corporate existence such power may be exercised by them pursuant to the laws of the state to which the corporation owes its life. * * * The general rule under the common law undoubtedly prohibited a prosperous corporation from dissolving unless all the stockholders assented. A dissenting stockholder was enabled to prevent such a sale. Abbott v. Am. Hard Rubber Co., 33 Barb. 578."

Limering v. Birmel, *supra*, is like New Hampshire Sav. Bank v. Richey, *supra*, no question of a dissenting stockholder being before the court.

Tanner v. Lindell Ry. Co., *supra*, is more pertinent to the question before the court than any of the authorities cited by the opinion, even though it refers to a public service corporation.

In this case a sale was authorized by the holders of at least two-thirds in value of the stock, and it was sought to be set aside by certain stockholders who claimed they had no notice of a meeting of the stockholders and were not present. The court said: "They ask that the sale be set aside and that the Lindell Company be rehabilitated in its former property and set to work under its own charter. This they ask, not upon any showing that any wrong has really been done them, not that the transaction was not fair and profitable, not that they were not afforded an opportunity of participation in it to the same extent that was accorded the most favored, but upon the bare naked legal proposition that it is a violation of the implied contract between the stockholders *inter sese*, to sell the property of the corporation so as to disable it from doing business without the consent of all. To concede to the plaintiff the right to annul the sale under those conditions would be to place the holder of one share of stock in position to dictate to the majority the terms on which a sale might be made, giving him an advantage which reason and justice cannot approve. That is not the law. If under those circumstances the sale was a breach of the implied contract, the courts of law are open to the plaintiffs to sue for damages for the injury, but there is nothing in the case to arouse a court of equity into action. If the court should grant the plaintiff's request and set aside the sale, who can foresee the consequences that might result?"

The consequences viewed to be direful relate, it appears from the decision, to stock and bond holders of the purchasing corporation.

Then the court says: "It is not necessary in order to redress the plaintiff's wrongs, that any such remedy be applied. They are entitled to recover in a proper proceeding the value of their stock at the time of its conversion, if they elect to consider it a conversion, or they are entitled, to other things enumerated, but they are not entitled to pull down the whole new structure that has been built upon the properties that have been transferred to the United Railways Company under the circumstances stated in the petition."

We have made these extended extracts, because it seems to us, that, at bottom, the common law rule is recognized, that one dissenting stockholder has the legal right to object to a sale which deprives a selling corporation of its ability to carry on its business.

The Missouri court expressly concedes that the non-assenting stockholders were not absolutely bound by the sale, because they had an election to sue for a conversion. What it sets up in the way of an estoppel seems not at all forceful, because the purchasers of the purchasing company's stock ought to have seen what was back of that stock, and so those who invested in its bonds. The reasoning leaves something of a bad impression. It was as much the business of holders of stock or investors in bonds to see that the purchasing corporation had a good title, as any purchaser of land ought to see. The minority dissenters had nothing to do with their investments. They either had a legal right at the time of the pretended sale not to be bound thereby or they did not have such right. And the court says they could elect to consider the transaction a conversion.

There seems not a single case cited by the principal case, that really supports it, but where they are applicable at all they seem in principle the other way.

The New York case, as is shown, labors to get away from the general rule; the Richey case is inapplicable; the Metcalf case turns on a statute, admitting that otherwise the rule would control, and the Missouri case makes the minority bound by acts subsequently done by the purchaser, over which acts they had no control.

It may be said of the case of Treadwell v. Salisbury Mfg. Co., *supra*, that there was

direct action for a winding up of the business of the corporation, and the sale that was resolved upon was in pursuance to that. In the principal case the corporation is merely stripped of its power to carry on business by a majority of its stockholders denuding it of its property.

What Judge Gray says as to its power at common law is squarely contradicted in the cases we refer to, and his *obiter* remark should not be taken as authority. C.

CORRESPONDENCE.

DISQUALIFICATION OF JUDGE BY REASON OF HAVING BEEN OF COUNSEL.

Editor Central Law Journal:

Your comment in issue of July 21, 1911, on the case of Hamilton County v. Aurora National Bank (Neb.) 131 N. W. 221, is, it seems to me, aside from the real grounds for criticism and fails fairly to indicate the questions involved or the position of counsel.

Five only of the seven judges heard the oral arguments, two declining for reasons by them deemed sufficient to participate in the hearing of the case, and of the sitting members three voted for reversal and two for affirmance. The court was not by that division involved in a "dilemma" since, appellant having failed to show the error alleged, judgment of affirmance should have followed; and it was a mistaken sense of responsibility which led the sitting members to "urgently" invoke the participation of an associate, doubtful, to say the least, of his own qualification.

That affirmance results from the vote of a minority for reversal I had supposed to be settled beyond question both in this country and in England. As said by Chancellor Walworth in Bridges v. Johnson, 5 Wend. 343, the question in all courts of review, however stated, is, shall the judgment be reversed? and that in the absence of a majority favoring reversal, the judgment stands affirmed, it being presumed to be right until the contrary is shown. The Nebraska constitution adds nothing to the law of the subject and the Nebraska court stands alone in ruling on its own motion, and it seems without consideration, that concurrence of a majority of its members is essential in every case to a judgment of affirmance.

You err in saying, page 39, that "in a similar case against the same defendant the reluctant judge represented it." The fact is that the self-recused judge represented another defendant in a case involving the same fund and some of the same issues. But the same judge actually appeared in this particular case adversely to the plaintiff and made a forceful argument in support of a plea in abatement interposed therein, he having previously alleged the identical matter of abatement by answer in behalf of his own client, and all questions of abatement were distinctly presented by this record, although not pressed for determination, at the time the judge participated in the decision of the case on appeal and cast the deciding vote for reversal. Such relation may not as you say be within the letter, but is without doubt within the spirit and purpose of the statutory disqualification.

It is said by the court that the question argued by the judge in the court below "was preliminary and unimportant" thereby indicating an entire misconception of the end and purpose of the plea in abatement, viz.: the defeat of the action or proceeding. To that end the judge's argument was directed and it cannot be said that he was any the less a partisan for defending by plea instead of answer or for contesting with plaintiff the same ground in two actions instead of one. Such, independently of statute, is a disqualifying relation, as shown by the wealth of authority cited in this case, and the court is hardly fair to itself in its holding to the contrary on the authority of an obscure Texas case which is not even in point, and the expression cited is at most pure dictum, opposed to the more recent decisions of the courts of that state.

Judges, it is said, were at common law disqualified by the interest which disqualified jurors, and it is inconceivable that one should be suffered to serve as a juror in a controversy to which he is related as was the recused judge to this case, or who entertains a corresponding doubt of his own qualification, while the thought that the judge was able to succeed as such where he had failed as an advocate is revolting to the mind of lawyer and laymen.

Sincerely yours,

A. M. POST.

Columbus, Neb., July 28th, 1911.

[Note.—We thank our correspondent for his correction of our statement of fact, and as he speaks from personal knowledge and we only from our apprehension of the record, we take it his statement is preferable to ours. That correction, however, does not seem to operate against the conclusion we reached, as both, we and he say that the spirit, if not the letter, of the statute should have prevented the recused judge from acting. Our correspondent's version fortifies more strongly the position we took. For such as may not have read our comment, we repeat that it seems four concurring judges are necessary to reverse a case, that is to say, a majority of a full bench, whether a less number sit or not. The only matter in which we appear to disagree with our correspondent is in our urging, that a judge may not voluntarily recuse himself, because he is embarrassed but not actually disqualified. If he is excused but it is found, that an appellant must have his presence to decide a case, it ought to be represented to him that his participation is necessary, and the case should be reargued. In this case that course was not taken, and for this we said the court had not proceeded correctly, even if it might be admitted the "reluctant" judge was not disqualified.—Editor.]

To the Editor Central Law Journal:

In your "Notes of Important Decisions," in Vol. 73, No. 3, on pages 38 and 39, (July 21, 1911), you comment interestingly under the caption: 'Courts—Disqualification of Judge by Reason of Having Been of Counsel." The instant case concerns the Nebraska Supreme Court and its rulings, where a member had been previously of counsel. Of course, it deals with a peculiar case under the Nebraska statute.

The general subject, however, has more than passing interest for the members of the bench and bar of Wisconsin, because our Legislature, at its recent session, enacted some radical but

needed amendments to existing law on the subject.

For instance, section 754 of the existing statutes of Wisconsin provided as follows: "No district attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend; nor shall any district attorney while in office be eligible to or hold any judicial office whatever."

The foregoing would seem to be pretty comprehensive legislation, intending to fit any conceivable case likely to arise in actual practice. But it was shown to be inadequate law. Accordingly, the following amendment was added to the foregoing by our last Legislature, taking immediate effect: "nor shall any person who shall have acted as district attorney, assistant district attorney, or special district attorney at the time of the arrest, examination, or indictment of any person charged with crime, and who was at such time such official of the county where the crime charged was committed, thereafter appear for, or defend such person against the crime charged in such complaint, information, or indictment."

It will be readily seen that the original statute does not cover conditions provided for by the amendment. And yet, a nice sense of the ethics of the profession would seem to make quite unnecessary the above amendment. It is to be said, however, with regret, that the legislation was needed.

Section 2588 of the revised statutes of the state was slightly amended by the last Legislature. It reads as follows, as amended; "No person shall be employed or allowed to appear as counsel or attorney before any court in any action which shall have been previously determined before him as a judge, justice, or examining magistrate."

The ethics of the bench and bar ought to make unnecessary such legislation as is indicated in the quotations submitted. There should be a loftier ideal than that made possible by mere statutory enactment. Such ethics and such ideals do, indeed, exist. But they are altogether too infrequent.

DUANE MOWRY.

Milwaukee, Wis., July 28, 1911.

BOOK REVIEWS.

AMERICAN DIGEST, 1911, VOL. 10.

Volume 11 of American Digest, key-numbered with the Century and Decennial Editions of the same work, brings the digest of current decisions in the National Reporter System down to January 31, 1911.

This volume embraces five full months, beginning with September, 1910, and contains 2,643 pages.

Thus the grist, as shown merely by syllabi of reported cases for five months of American appellate decision.

Whatever of good or bad law these courts have announced in this short period you may in this volume be referred to, and in addition be referred back to the editions it is made a part of.

The work of digesting American law is wonderful for its volume and still more wonderful for the system achieved in its performance.

Volume 10 is in the usual binding of law buckram and the execution of the same excellence as those to whose company it is sent. It comes from West Publishing Co., St Paul, Minn. 1911.

ANCIENT, CURIOUS AND FAMOUS WILLS.

Mr. Virgil M. Harris, Lecturer on Wills in St. Louis University Institute of Law, appears in a very gracefully written and interesting volume under the above title.

Mr. Harris states in his preface that he has had experience of many years in the practical administration of estates, and the labor and care he has bestowed in this work was with evident zest and enjoyment.

There are some five hundred of these solemn documents in this volume, but it is not to be thought that the collection is to be taken up in mournful mood for a proper appreciation of their contents.

There is much of philosophical reflection to be indulged in seeing what men have wanted to tell the world, after they have passed beyond its activities.

We learn more from these documents coming down through the ages than what were the wishes of their authors, or their characters and peculiarities. We get a hint of the manners and customs of the times and in this way they help to piece out our more general historical view.

Mr. Harris divides this work into the following chapters: "Practical Suggestions for Will Writing;" "Ancient Wills;" "Wills in Fiction and Poetry;" "Curious Wills;" "Testamentary and Kindred Miscellany;" "Wills of Famous Foreigners;" "Wills of Famous Americans," all of which gives promise of interest and useful suggestion.

The work should prove a good seller not only from a professional standpoint, but to the general reader of intelligence as well.

The work is bound in cloth, of superior mechanical execution, of less than 500 pages under one cover and comes from the publishing house of Little, Brown & Company, Boston, 1911.

HUMOR OF THE LAW.

A Dutchman was summoned in court to identify a stolen hog. On being asked by the lawyer if the hog had any earmarks, he replied: "Te only earmarks dot I saw vas his tail vas cut off."—Case and Comment.

Judge. Why did you steal the gentleman's purse?

Prisoner. I thought the change would do me good.—Washington Star.

The lawyer fell and tore his clothes,
And the mishap made him feel
That, as the phraseology goes,
He'd lost a suit on a-peal.

—Lippincott's.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Attachment**—Jurisdiction.—The jurisdiction of the court, in an action by attachment against a defendant not personally served and not appearing, held to depend on whether there is a res on which it can act.—Smith-Premier Typewriter Co. v. National Cash Register Co. Mo., 135 S. W. 992.

2.——Unliquidated Damages.—An attachment held not to lie where the debt claimed is unliquidated and any amount that might be fixed upon would be conjectural.—Christie & Lowe v. Pennsylvania Iron Works Co., La., 54 So. 742.

3. **Attorney and Client**—Lien for Services.—An attorney's lien for services should be satisfied out of property subject thereto in the inverse order of alienation, in case of conveyance by the client.——Butts v. Carey, 128 N. Y. Sup. 533.

4. **Bankruptcy**—Allowance of Claim.—After allowance of a claim on a note, the claimant was entitled to withdraw the original note and deposit a copy.—In re Loden, D. C., 184 Fed. 865.

5.——Farmer.—A person engaged in feeding cattle for market held engaged in "farming," and therefore not subject to adjudication as an involuntary bankrupt.—In re Dwyer, C. C. A., 184 Fed. 880.

6.——Jurisdiction.—Where, after the property of an alleged bankrupt had been sold, the proceedings were dismissed for want of jurisdiction, an order allowing fees and disbursements to the trustee's attorney would be set aside as to everything beyond actual disbursements and compensation for services rendered in preserving the estate.—In re Eagle Steam Laundry Co. of Queens County, D. C., 184 Fed. 949.

7.——Partnership.—An individual creditor of a partner of a bankrupt firm held not entitled to payment of interest accruing subsequent to bankruptcy out of the individual assets of the partner as against partnership creditors.—In re Chandler, C. C. A., 184 Fed. 887.

8.——Preferential Transfer.—A trustee in bankruptcy under Bankr. Act, sec. 60, or sec. 70, may sue at law to avoid a preferential transfer, and to recover value of the property transferred.—Allen v. Gray, N. Y., 94 N. E. 652.

9.——Procedure.—Whether a bond for title to certain land previously owned by a bankrupt and transferred to his aunt, to whom he was indebted, was transferred absolutely or as security, could not be determined in a summary proceeding to which the aunt was not a party.—In re L. B. Pickens & Bro., D. C., 184 Fed. 954.

10.——Provable Debts.—The amount agreed to be paid for commercial reports under a subscription commercial agency contract held provable against the subscriber's estate in bankruptcy for the unpaid price, though only a small portion of the time contracted for had expired.—In re Glick, D. C., 184 Fed 967,

11.——Test of Insolvency.—The test of a firm's solvency or insolvency within the Bankrupt Act, is whether the real indebtedness of the firm to the petitioning creditor or creditors exceeds the aggregate at a fair valuation of the firm's property.—In re Morgan & Williams, D. C., 184 Fed. 938.

12. **Banks and Banking**—Negligence. — A bank is not negligent in cashing a draft on an indorsement of one introduced as the owner by a person well known to the bank, though the bank guarantees the indorsement.—Kelley v. Planters' & Merchants' Nat. Bank, Tex., 135 S. W. 1142.

13.——Off Set.—The appointment of a receiver held not to deprive a depositor of the right of set off a general deposit against a note given by him to the bank.—Steelman v. Atchley, Ark., 135 S. W. 902.

14. **Bills and Notes**—Demand by Telephone. —Demand of payment of a note by telephone held insufficient to hold the indorser.—Gilpin v. Savage, N. Y., 94 N. E. 656.

15.——Extension.—An agreement to extend the time of payment of a note made without consideration is not binding.—National Live Stock Commission Co. v. Thero, Mo., 135 S. W. 961.

16.——Negotiable Instruments Law.—A bank taking a note from the payee as collateral security held to be a holder thereof in due course under Negotiable Instrument Law.—National Bank of Commerce in St. Louis v. Morris, Mo., 135 S. W. 1008.

17. **Brokers**—Compensation.—Where a broker is employed to find a purchaser for real estate, and procures one ready and able and willing to buy, he is entitled to his commissions, although the sale is prevented by defects in

the vendor's title.—Smith v. Peyrot, N. Y., 94 N. E. 662.

18.——Ratification.—An owner of stock which was sold by brokers at a less price than that originally authorized held not entitled to recover from his brokers the difference between the price at which it was sold and the original price authorized, having ratified the sale.—Ackerman v. Dick, 128 N. Y. Sup. 603.

19.——Reasonable Time.—Where a contract employing a broker does not limit the time, he has a reasonable time for performance.—Hall v. Olsen, Or., 114 Pac. 638.

20. **Burglary**—Breaking.—Opening of door, though not fastened or latched, and entering thereby, held a "breaking."—Bloodworth v. State, Ga., 70 S. E. 892.

21. **Carriers**—Employee as Passenger. — An employee being transported by a railroad company to his place of work is not a passenger. —St. Louis, I. M. & S. Ry. Co. v. Wiggan, Ark., 135 S. W. 889.

22.——Protection from Insult.—That a railroad conductor was not instructed to use insulting language toward a passenger held not to relieve the company from liability for mental anguish resulting to the passenger.—Bleecker v. Colorado & S. Ry. Co., Colo., 114 Pac. 481.

23.——Riding on Pass.—A servant of a railway company, riding on a pass, and injured through the negligence of the motorman, is a passenger, and the employer is liable.—Harris v. City & E. G. R. Co., W. Va., 70 S. E. 859.

24.——Right of Action.—In an action against carriers, damages to cattle not owned exclusively by the plaintiff is recoverable to the extent of his interest.—Eastern Ry. Co. of New Mexico v. Littlefield, Tex., 135 S. W. 1086.

25.——Twenty-eight Hour Law.—The twenty-eight hour law, though construed to apply to shipments of animals from one state to another through a foreign country, held not objectionable as operating extra-territorially.—United States v. Lehigh Valley R. Co., C. C., 184 Fed. 971.

26. **Chattel Mortgages**—Retention of Possession.—A chattel mortgage, where the mortgagor retains possession, must be in writing, duly acknowledged, and filed for record.—Lee Wilson & Co. v. Crittenden County Bank & Trust Co., Ark., 135 S. W. 885.

27. **Commerce**—Intoxicating Liquors.—Provision of prohibition law forbidding any person to solicit purchase of intoxicating liquors, held not a violation of the interstate commerce clause of the Constitution.—Williams v. State, Okl., 114 Pac. 624.

28.——Liability Act.—The federal employer's liability act, imposing liability for injuries or death to employees of railroad company, held to only impose liability for injuries incurred while engaged in interstate commerce.—St. Louis, I. M. & S. Ry. Co. v. Hesterly, Ark., 135 S. W. 874.

29.——Taxation.—Coal shipped from Pennsylvania and dumped on a dock in New Jersey, preliminary to being transshipped in bottoms to other states, held not merchandise in interstate commerce while located on the dock, and was not, therefore, exempt from state taxation as such.—Susquehanna Coal Co. v. City of South Amboy, C. C., 184 Fed. 941.

30. **Contracts**—Construction.—The law does not presume that parties to a contract intend by it to accomplish an illegal object, but rather the contrary.—Page v. Metropolitan Life Ins. Co., Ark., 135 S. W. 911.

31.——Illegality.—A contract of a city tax collector to receive a fixed compensation, instead of a per centum of the amount collected, held invalid.—City of Pittsburg v. Goshorn, Pa., 79 Atl. 505.

32.——Oral to be Written Out.—If an oral agreement is reached, it takes effect immediately, though the parties understand it shall be put into formal writing, unless one of the conditions agreed to orally is that the agreement shall remain ineffective until the writing is executed.—Concannon v. Point Min. & Mill. Co., Mo., 135 S. W. 988.

33.——Performance.—Plaintiff cannot recover upon a contract not completely performed, the completion of performance of which was prevented by himself.—M. Wineburgh Advertising Co. v. Sol Bloom, 128 N. Y. Sup. 562.

34.——Rescission.—Rescission of a contract is sustained by reciprocal release from the mutual obligations.—Kilgore Lumber Co. v. Thomas & Hammonds, Ark., 135 S. W. 858.

35.——Right of Rescission.—Retention of the benefits of a contract held inconsistent with the assertion to rescind.—Redrow v. Sparks, N. J., 79 Atl. 450.

36. **Corporations**—Control by Courts.—Courts will not readily interfere with the acts of directors of a corporation in the absence of a clear showing of fraud or breach of trust.—McCloskey v. New Orleans Brewing Co., La., 54 So. 738.

37.——Control by Courts.—Except under special circumstances, courts will not take away from the directors the control of the corporate business.—Sellman v. German Union Fire Ins. Co. of Baltimore, D. C., 184 Fed. 977.

38.——Directors as Trustees.—The relation of directors of a corporation to the stockholders held that of trustee and cestui que trust.—People v. Powell, N. Y., 94 N. E. 634.

39.——Equity.—A court of equity cannot in any case dissolve a corporation and make distribution of its assets.—Ashton v. Penfield, Mo., 135 S. W. 938.

40.——False Representations.—False representations in the sale of corporate stock held no defense to the stockholder's liability for the balance remaining unpaid in a suit by the corporation's trustee in bankruptcy to recover the same.—Southworth v. Morgan, 128 N. Y. Sup. 598.

41. **Covenants**—Eviction.—A purchaser accepting a general warranty deed held not entitled to recover damages for breach thereof, unless there has been an actual or constructive eviction.—Smyth v Doross, Mo., 135 S. W. 973.

42.—Offset.—A covenantor, on paying a mortgage debt, held entitled to assert the same as an offset against the covenantee's claim for breach of covenant.—Allen v. Miller, Miss., 54 So. 731.

43.——Running With Land.—That a covenant may run with the land, it must respect the thing granted, and the act covenanted must

concern the estate conveyed.—Tennant v. Tennant, W. Va., 70 S. E. 851.

44. **Criminal Law**—Aiders and Abettors.—There can be no aiders or abettors where there is no crime.—Williams v. State, Okl., 114 Pac. 624.

45.——Burden of Proof.—The burden of proof never shifts from the state in a criminal case.—Hampton v. State, Miss., 54 So. 722.

46. **Damages**—Liquidated or as Penalty.—Whether provision for forfeiture is intended for liquidated damages or a penalty held to depend on the intention of the parties.—Clark v. Britton, N. H., 79 Atl. 494.

47. **Death—Companionship** of Husband.—Loss of a husband's companionship, held not an element of damage by his wrongful death.—Helena Gas Co. v. Rogers, Ark., 135 S. W. 904.

48.——Lex Loci.—In actions for death, recovery is determined by the law of the state wherein the injury was sustained.—St. Louis, I. M. & S. Ry. Co. v. Hesterly, Ark., 135 S. W. 874.

49.——Proximate Cause.—Where an injury precipitated an attack of delirium tremens resulting in death, it was the proximate cause of the death.—McCahill v. New York Transp. Co., N. Y., 94 N. E. 616.

50. **Dedication**—Acceptance.—City, accepting dedication of streets by working the same, held to acquire easement in their use.—Wade v. Town of Cornelia, Ga., 70 S. E. 880.

51.——Street in Plat.—One purchasing lots according to a recorded plat, does not thereby acquire title to the streets as against the public easement.—City of Gainesville v. Thomas, Fla., 54 So. 780.

52. **Deeds**—Conditions Subsequent.—Conditions subsequent in a deed held not favored in law.—Kampman v. Kampman, Ark., 135 S. W. 905.

53.——Void for Uncertainty.—A conveyance of a present estate to the heirs or heirs of the body of a living person held void for uncertainty.—Aetna Life Ins. Co. v. Hoppin, Ill., 94 N. E. 669.

54. **Divorce**—Extreme Cruelty.—Where a spouse while drunk or drinking says or does things amounting to extreme cruelty, a divorce on the ground of extreme cruelty may be obtained.—Sedgwick v. Sedgwick, Colo., 114 Pac. 488.

55.——Public Policy.—Public policy requires that the marital relation be not severed, with all of its deplorable results, without adequate cause.—Stewart v. Stewart, Ind., 94 N. E. 564.

56.——Venue.—A wife on abandoning her husband held entitled to choose her residence for purposes of venue of a subsequent action for divorce.—McLean v. Randell, Tex., 135 S. W. 1116.

57. **Domicile**—Husband and Wife.—Where a husband without lawful cause, excludes his wife from their home in another state, she may acquire an independent domicile in New York.—Elwell v. Elwell, 128 N. Y. Sup. 495.

58. **Dower**—Paramount Right.—The right of dower held paramount to the right of any other interest of one claiming under the husband, including a homestead right, etc.—Elder v. McIntosh, S. C., 70 S. E. 807.

59.——Seisin.—At common law it was essential that a husband should have been seised in possession during coverture in order to entitle his widow to dower in his land.—McGuire v. Cook, Ark., 135 S. W. 840.

60. **Easements**—Implied Reservation.—Upon a severance of title, a quasi easement may arise by way of implied reservation as well as by implied grant.—Taylor v. Wright, N. J., 79 Atl. 433.

61. **Embezzlement**—Pleading.—An indictment for embezzlement of funds of the American Express Company, a corporation, cannot be sustained by proof that the funds belonged to the American Express Company, a partnership.—Hampton v. State, Miss., 54 So. 722.

62. **Eminent Domain**—Easement.—A railroad company acquires by condemnation but an easement in the land taken.—Cleveland, C., C. & St. L. Ry. Co. v. Doan, Ind., 94 N. E. 598.

63.——Public Use.—Where the Legislature has authorized condemnation for public use, courts cannot inquire into the question of necessity.—Chicago, I. & L. Ry. Co. v. Baugh, Ind., 94 N. E. 571.

64.——Raising Grade.—In an action for damages for raising the grade of a railroad and obstructing the crossing, that the injury was common to all other property fronting on the street will not bar plaintiff's right of recovery.—Powell v. Houston & T. C. R. Co., Tex., 135 S. W. 1153.

65.——State Property.—The right of eminent domain given by the state does not include the power to condemn the property of the state.—Wilson v. East Jersey Water Co., N. J., 79 Atl. 440.

66.——Statutory Construction.—Statutes creating the power of eminent domain should be strictly construed.—City of Gary v. Much., Ind., 94 N. E. 583.

67. **Equity**—Condition Precedent.—One resorting to an equitable remedy for the protection of a right or the redress of a grievance need not first reduce his claim to judgment and exhaust his legal remedy by execution or other appropriate process.—Summit Silk Co. v. Kinston Spinning Co., N. C., 70 S. E. 820.

68. **Estoppel**—Acceptance Benefits.—One who has accepted the benefits of an invalid contract is estopped from asserting its invalidity.—Sage v. Finney, Mo., 135 S. W. 996.

69. **Evidence**—Admissibility.—Under an averment as to agreed price, it is permissible for plaintiff to establish such price, either by express or implied agreement, but he cannot prove it by a quantum velebant.—Nashville, C. & St. L. Ry. v. Wood, Ala., 54 So. 753.

70.——Corporation Seal.—Where it appears that an instrument is signed for a corporation by its proper officers, the presumption that it was duly executed includes the authenticity of the seal.—Maisby v. Gamble, Fla., 54 So. 766.

71. **Exchange**—Expulsion of Member.—Where proceedings are instituted against a member of an exchange looking to his expulsion, he must first exhaust his remedies within the exchange before resorting to the courts.—Moyse v. New York Cotton Exchange, 128 N. Y. Sup. 112.

72. **Explosives**—Negligence.—In an action for damages from an explosion of dynamite, where plaintiff was injured in her own home, 1,030 feet away, held, that negligence was not an

element of plaintiff's cause of action.—Scalpino v. Smith, Mo., 135 S. W. 1000.

73. **Factors**—Revocation of Agency. — The insolvency of an agent is a ground for the revocation of the agency by the principal.—James Freeman Brown Co. v. Harris, S. C., 70 S. E. 802.

74. **Fraud**—Confidential Relation.—Equity will set aside a transaction on the ground of fraud where a confidential relation existed, whether the misrepresentations were as to facts or law.—Stephens v. Collison, Ill., 94 N. E. 664.

75. **Fraudulent Conveyances**—Creditors.—An arrangement whereby a cattle buyer secured payment to the sellers of the cattle out of the proceeds of the sale held not to be a fraud upon his creditors.—National Live Stock Commission Co. v. Thero, Mo., 135 S. W. 961.

76.——Possession of Pledge.—Without possession in the pledgee there is no privilege under the pledge as against third persons.—Lee Wilson & Co. v. Crittenden County Bank & Trust Co., Ark., 135 S. W. 885.

77. **Garnishment**—Jurisdiction.—A court without power to render judgment against a defendant held without jurisdiction to render judgment against the garnishee.—Smith-Premier Typewriter Co. v. National Cash Register Co., Mo., 135 S. W. 992.

78. **Guaranty**—Consideration.—An extension of time is sufficient consideration to support a guaranty to pay the note of another.—First Nat. Bank v. Taylor, Utah, 114 Pac. 529.

79. **Husband and Wife**—Slander by Wife.—A husband is liable for a slander uttered by his wife.—Townsley v. Yentsch, Ark., 135 S. W. 882.

80. **Infants**—Purchaser in Good Faith.—The rule that infants may avoid a decree for fraud held not to apply to the detriment of the purchasers in good faith.—Denk v. Fiel, Ill., 94 N. E. 672.

81. **Insurance**—Burglary.—A burglary insurance policy held to insure against burglary as defined by the statutes.—Rosenthal v. American Bonding Co. of Baltimore, 128 N. Y. Sup. 553.

82.——Insurable Interest.—A life insurance policy may be assigned, provided it is not done to cover a wager policy, though the assignee has no insurable interest.—Page v. Metropolitan Life Ins. Co., Ark., 135 S. W. 911.

83.——Waiver.—A general agent can waive any stipulations in the policy notwithstanding a clause therein forbidding it.—Hardy v. Aetna Life Ins. Co., N. C., 70 S. E. 828.

84. **Interest**—Receivership.—After the property of an insolvent passes into the hands of a receiver or an assignee in insolvency, interest is not allowed on the claims against the fund.—Atlanta Nat. Bank v. Four States Grocer Co., Tex., 135 S. W. 1135.

85. **Intoxicating Liquors**—Aider and Abettor.—The rule that one who aids and abets another in a misdemeanor is a principal applies to an illicit sale of liquor.—State v. Denton, N. C., 70 S. E. 839.

86. **Judgment**—Default.—The trial court has necessarily much discretion in passing upon applications to vacate a default judgment on the ground of exclusive neglect and inadvertence.—Webster v. Somer, Cal., 114 Pac. 575.

87.——Irregularity.—A judgment rendered, but not signed, is not void; the failure to sign being a mere irregularity.—Owen v. Harriott, Ind., 94 N. E. 591.

88. **Landlord and Tenant**—Disputing Title.—A tenant having repudiated the contract of tenancy and restored the premises to the landlord may sue therefor and show that he has the superior title thereto.—Lumpkin v. Woods, Tex., 135 S. W. 1139.

89.——Injury to Pedestrian.—Owner of a building held liable for injuries to a pedestrian on the sidewalk, caused by icicles falling on him.—Brewer v. Farnam, Mass., 94 N. E. 695.

90.——Quiet Enjoyment.—Lease of hotel implies lessor's covenant of quiet enjoyment in the use of its sewerage system.—Huggins v. City of Goldsboro, N. C., 70 S. E. 842.

91. **Libel and Slander**—Special Injury. — A false publication not being libelous per se, an action cannot be maintained without proof of special injury.—N. S. Sherman Mach. Co. v. Dun, Okl., 114 Pac. 617.

92. **Limitation of Actions**—New Promise.—In order to take a case out of the statute of limitations on the ground of new promise, such new obligation must either evidence an express promise to pay the debt or an unequivocal acknowledgment of its justice.—Cotulla v. Urbahn, Tex., 135 S. W. 1159.

93.——Starting Point.—An accommodation indorser held entitled to maintain an action against the maker on implied contract for payments made, though the note was barred by limitations.—Blanchard v. Blanchard, N. Y., 94 N. E. 630.

94. **Master and Servant**—Employee Under Age.—In an action for injuries to a boy under 14 years of age employed in a coal mine in violation of Laws 1907, misrepresentations as to the boy's age held not to preclude recovery.—Blankenship v. Ethel Coal Co., W. Va., 70 S. E. 863.

95.——Hospital Department.—A railroad company deducting sums from the pay of its employees and maintaining a hospital department held not liable to an employee for the negligence or malpractice of physicians employed by its hospital department—Arkansas Midland R. Co. v. Pearson, Ark., 135 S. W. 917.

96.——Promulgating Rules.—A master held required to promulgate rules for the safety of his servants.—Gilbourne v. Oregon Short Line R. Co., Utah, 114 Pac. 532.

97.——Safeguards.—A master is bound to cover revolving shafts, if it is practicable and customary to do so.—Dettering v. Levy, Md., 79 Atl. 476.

98.——Safe Place.—A place in which servants work held not unsafe, where it becomes so only from the failure of the servants to exercise ordinary care.—Shatrau v. Sullivan, N. Y., 94 N. E. 609.

99. **Mines and Minerals**—Relocation.—A claim of mining lands under a relocation is an implied admission of the validity of a location.—Zeiger v. Dowdy, Ariz., 114 Pac. 565.

100. **Negligence** — Automobiles.—Proof that the occupants of defendant's automobile did not know of an injury to plaintiff until told of it after it occurred held to indicate negligence.—Gray v. Batchelder, Mass., 94 N. E. 702.

101.——Concurrence.—One whose negligence efficiently concurs with that of another in causing an injury is liable therefor.—Moore & Savage v. Kopplin, Tex., 135 S. W. 1033.

102.——Pleading.—When a general allegation of negligence is followed by an enumeration and averment of specific acts of negligence, plaintiff will be confined to the negligence specifically assigned.—Sclapino v. Smith, Mo., 135 S. W. 1000.

103.——Proximate Cause.—Violation of certain penal statutes, though negligence per se, does not constitute actionable negligence, unless the proximate cause of the injury.—Steel Car Forge Co. v. Chec, C. C. A., 184 Fed. 868.

104. **Nuisance**—Prescription.—No user, however long, entitles one to maintain a nuisance.—Sherman v. Levingston, 128 N. Y. Supp. 581.

105.——Special Damage.—Plaintiff, establishing a right to recover for a public nuisance, may recover in the same action damages for special annoyance to himself and family.—City of Haskell v. Hartrick, Tex., 135 S. W. 1057.

106. **Partnership**—Share of Profits.—One who turned over a printing outfit to another on consideration that his compensation be one-third of the profits held not to be a partner—American Type Founders' Co. v. Greenwood Printing Co., S. C., 70 S. E. 803.

107. **Payment**—Compulsory.—A payment is deemed in law to be compulsory when the party making it cannot legally resist it.—Blanchard v. Blanchard, N. Y., 94 N. E. 630.

108. **Possession**—Color of Title.—If one takes possession of one of two adjoining tracts under a deed conveying both, if the actual title to the two tracts are in different persons, his actual possession of one will not give him constructive possession of both.—Arnold v. Chas. T. Abeles & Co., Ark., 135 S. W. 833.

109. **Principal and Surety**—Mortgage.—The maker of a note held not to become a mere surety because, when afterwards conveying to a third person the property mortgaged to secure the notes, he told the payee it must look to such person as principal obligor.—Witt v. Amarillo Nat. Bank, Tex., 135 S. W. 1108.

110.——Renewal Note.—A surety, signing a renewal note as maker, held not entitled to deny his liability as maker as against the cosurety.—Donald v. First Nat. Bank, Miss., 54 So. 721.

111. **Railroads**—Question of Fact.—Where reasonable men cannot differ upon the proposition that, if the traveler had looked or listened, he must have discovered the approaching train in time to have avoided a collision, the question of his negligence is one of law.—Bates v. San Pedro, L. A. & S. L. R. Co., Utah, 114 Pac. 527.

112.——Rules for Employees.—Where two railroad companies adopted rules for their mutual benefit, the negligence of an employee of one of the companies in failing to comply with the rules held available to the other company.—Gilbourne v. Oregon Short Line R. Co., Utah, 114 Pac. 532.

113. **Sales**—Article to be Manufactured.—A manufacturer of an article sold by him held liable in damages for delaying completion of repairs without just cause.—Christie & Lowe v. Pennsylvania Iron Works Co., La., 54 So. 742.

114.——Reasonable Price.—If a sale be made without a specification of the price, or any method by which it is to be subsequently determined, the law will imply a reasonable price; and this principle applies to executory as well as executed sales.—Nashville, C. & St. L. Ry. v. Wood, Ala., 54 So. 753.

115.——Warranty.—On a sale by sample, there is an implied warranty of quality.—Meyer, Wilson & Co. v. Everett Pulp & Paper Co., C. C., 184 Fed. 945.

116. **Specific Performance**—Part Performance.—A verbal contract for sale of land may be enforced in equity, where there has been a part performance.—Preston v. West, W. Va., 70 S. E. 853.

117. **Taxation**—Exemption.—All property not specifically exempt is subject to taxation.—Wyoming Central Irr. Co. v. Farlow, Wyo., 114 Pac. 635.

118.——Inheritance Tax.—Under proposed legislation for inheritance tax, there is no objection to a distinction between direct heirs and collaterals.—In re Opinion of Justices, N. H., 79 Atl. 490.

119.——Presumption.—A tax assessment, made by duly constituted assessors, will be presumed to be correct.—People v. Woodbury, 128 N. Y. Supp. 522.

120. **Torts**—Pleading.—In an action ex delicto, where the real cause is not negligence, but a different tort of which negligence may be an ingredient, the averment of negligence is immaterial.—Scalpino v. Smith, Mo., 135 S. W. 1000.

121. **Trusts**—Equity.—A court of equity in its jurisdiction over trusts is not bound by the technical rules of the common law, and will seek the intention of the grantor from the whole instrument.—Buist v. Williams, S. C., 70 S. E. 817.

122.——Mingling Property.—If one mixes trust funds with his own money, the whole will be treated as trust property, except so far as he is able to distinguish his.—Moore v. First Nat. Bank, Mo., 135 S. W. 1005.

123. **Unincorporated Associations**—Partnership.—A voluntary unincorporated association may be a partnership.—O'Rourke v. Kelly The Printer Corporation, Mo., 135 S. W. 1011.

124. **Vendor and Purchaser**—Innocent Purchaser.—To constitute one an innocent purchaser of land, there must be a valuable consideration, absence of notice of adverse claims, and good faith.—Houston Oil Co. of Texas v. Hayden, Tex., 135 S. W. 1149.

125.——Marketable Title.—A purchaser who rejects a title because unmarketable and who sues for the money paid has the burden of proving unmarketability.—Reynolds v. White, 128 N. Y. Supp. 529.

126. **Wills**—Execution.—A will signed by testatrix after it is signed by witnesses held not properly executed.—Barnes v. Chase, Mass., 94 N. E. 694.

127.——Specific Legacy.—Bequest of balance due on a note held a "specific legacy," taking effect at the time of the testator's death, and that neither the estate nor its assignee could thereafter collect interest.—Martin v. Barger, Wash., 114 Pac. 505.

128.——Testamentary Capacity.—One may be very feeble, aged, and infirm and suffering from disease, and yet be capable of disposing of his property by will.—In re Weber's Estate, Cal., 114 Pac. 597.

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

Central Law Journal Company,

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two volumes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Copyright, 1911, by Central Law Journal Co.
Entered at the Post Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR.

CONTENTS.

University of Michigan.

Three years course leading to the degree of LL. B. The degree of Juris Doctor (J. D.) open to graduates of approved universities and colleges. Regular session October to June inclusive. Credit towards either degree may be obtained through work in the summer session of ten weeks. Law library of about 30,000 volumes. For announcements, address,

DEAN, DEPARTMENT OF LAW,
University of Michigan, Box X, Ann Arbor, Mich.

Volume 20 Decennial Digest

Completes the text of this great digest of American case law down to 1906. The remaining volumes of the set (21 to 25) will be given up to

A Complete Table of All American Cases

This is the first complete table of cases ever published in this country.

It will serve as an index to the entire body of American case law.

Any case cited will serve as a guide to all related authorities.

Write for full explanation.

West Publishing Co.
St. Paul, Minn.

C7 354b

LEGAL DIRECTORY.

CALIFORNIA.

Long Beach . . . Thos. A. Sherwood

ILLINOIS.

Peoria . . . . . Henry C Fuller

IOWA.

Webster City . . . Wesley Martin

MASSACHUSETTS.

Boston (28 School St.) . J. W. Pickering

MISSOURI.

Liberty . . . . . D. C. Allen

TEXAS.

Fort Worth . . . . John L. Poulter
American Natl. Bank Bldg. Civil and Commercial Practice.

Salesmen Wanted!

We could use a few more salesmen to sell the Central Law Journal.

Lawyers often succeed in this kind of work.

CENTRAL LAW JOURNAL COMPANY,
420 Market St. St. Louis, Mo.

South Dakota Corporations

The incorporation laws of this State are liberal and fair. The expense is small. Liability of stockholders is limited. This firm is giving special attention to the incorporation of corporations and to the law governing them.

Business sent to this office will be given prompt attention.

BOUCHER, O'BRIEN, JOHNSON & AULDRIDGE, Pierre, South Dakota

Rooms 1 and 2 Pierre St. Block, over Pierre Banking & Trust Co.

L. T. BOUCHER; HARRY O'BRIEN; R. C. JOHNSON, Attorney-General; T. F. AULDRIDGE

NO TAXES HERE

INCORPORATE UNDER ARIZONA LAWS.

Most liberal Corporation Laws in the United States. No franchise or annual Tax. Private property exempt from all corporate debts. Legislature cannot repeal your charter. Keep offices and do business anywhere. "Daggs on How to Run a Corporation" free to companies incorporated through us. This is a well-bound law book of five hundred pages. It tells just what to do and how to do it. Also investigate our "Universal Corporate Record." Four books in one. No other like it. Free to companies incorporated through us if requested. Fee very small. Write for free booklet, codified and annotated corporation laws and other information before incorporating.

References: Union Bank & Trust Co., The Western Investment Co., Phoenix.

Arizona Corporation Charter Guarantee Co.

Room 318 National Bank of Arizona Bldg.

PHOENIX, ARIZ.

H. R. DAGGS, President — P. H. HAYES, Vice-Pres. — W. E. MILLIGAN, Secretary
ATTORNEYS AT LAW

Lest You Forget

the fact that you are reading the best law journal in the United States, pardon us for calling attention occasionally to letters like the following:

WOOD, HENDERSON & WOOD
Hot Springs, Ark.

February 1, 1910.

Central Law Journal Co.:

I take occasion to say that I have been a subscriber to the Central Law Journal for a number of years and have the entire set. I consider it a very valuable journal and expect to continue a subscriber as long as I practice law.

Respectfully,

J. P. HENDERSON.

Price $5.00 Per Annum

Central Law Journal Company,

420 Market Street, ST. LOUIS, MO.

THE BEST FORM BOOK ON FIRST PLEADINGS

Gregory's Common Law Declarations

BY

GEORGE C. GREGORY,

of the Richmond (Va.) Bar

Deposition of a "Practicing Lawyer" On Behalf of this Work

Q. What pleading gives you the most trouble?

A. My declaration, of course.

Q. How often have you been thrown out of court or limited in your recovery or greatly delayed in the hearing of your case by unfortunate errors in your petition?

A. Not a few times, I am sorry to say.

Q. Did you know that there was a work that would have saved you these mistakes?

A. No; what book is it? I should certainly like to have it.

Q. That book is Gregory's Common Law Declarations, containing 109 *complete* forms for beginning an action at law and covering fully every point from parties to the prayer for relief. Don't you think such a book would be useful to you?

A. I think it would be absolutely necessary, provided I could rely on each form.

Q. Every form in this work is sanctioned by several authorities cited in a note thereto. Is this sufficient?

A. Certainly. And you may send me a copy of this work with bill therefor by the first mail out of St. Louis.

---

226 Pages Bound in Sheep, Price, $3.00 Delivered Free

Central Law Journal Co.

420 Market Street, St. Louis, Mo.

"The Lawyers' Friend"

BARGAINS FOR AUGUST

GOOD, SOUND, SECOND-HAND

Write for price where same is not given. Prices are net cash with order, except we will pay freight on bills amounting to $100.00 or more.

American Digest, 1897 to 1906, incl., 20 vols.; nearly new	$ 30.00
American Decisions, 100 vols.	
American Reports, 60 vols.	
Rapalje's Digest of same, 3 vols.	
American State Reports, 137 vols.	
Greens' A. S. R. Digest, 4 vols.	
A. & E. Ency. of Law, 1st Ed., 31 vols.	25.00
A. & E. Ency of Law, 1st Ed., 29 vols.	20.00
A. & E. Ency. of Law, 2nd Ed., 32 vols.	75.00
Same with supplement, 5 vols.	100.00
American Negligence Cases, 16 vols. and American Negligence Reports, 16 vols.	32.00
Ballard's Annual of Real Property, 11 vols.	33.00
Bennett's Fire Insurance Cases, 5 vols.	5.00
Century Digest, 50 vols.	
California Reports, 63 vols. to the Pacific Reporter	100.00
Current Law, 15 vols.	60.00
District of Columbia Digest (Maupin)	
Ency. of Evidence, 14 vols. and 1910 Supplement	65.00
Ency. of Forms, 18 vols.	36.00
Ency. of Pleading and Practice, 23 vols.	46.00
Same with supplement, 4 vols.	60.00
Federal Reporter, 186 vols.	
Federal Reporter Digest, 7 vols.	
Federal Statutes Annotated, 11 vols.	55.00
Green's Complete Texas Digest, 5 vols.	55.00
Nebraska Reports, vols. 1 to 8, inclusive.	14.00
Pattison's Missouri Digest, 9 vols.	36.00
Rose's Notes on U. S. Reports, 13 vols.	55.00
Rose's Notes on U. S. Reports, 13 vols. and supplement, 5 vols.	75.00
S. W. Reporter Digest, 9 vols.	
Thompson on Negligence, 7 vols.	31.50
Wigmore on Evidence, 5 vols.	24.00

KANSAS.

Reports, new or second-hand.
L. R. A., 70 vols.
L. R. A., 70 vols., extra annotated.
L. R. A. Digest, 3 vols., 1 to 70.
L. R. A. Index Digest, 2 vols. of 1 to 60.
L. R. A., New Series, 31 vols. and Digest of 1 to 24.

MINNESOTA.
Reports, 25 vols. to N. W. Single Volume Edition
Municipal Corporation Cases, Annotated, 10 vols. 10.00

MICHIGAN.
Reports, 40 vols. and Chancery, 4 vols. to N. W. 60.00

MISSOURI SUPREME COURT & COURT OF APPEAL.
Reports, Full set or up to the S. W. New or second-hand
N. W. Digest, 1 vol. of 51 to 60.

NEW YORK COMMON PLEAS.
E. D. Smith, 4 vols. 8.00
Hilton, 2 vols. 2.00
Daly, 2 vols. 4.00

NEW YORK COMMON LAW.
80 vols. in 17 and Digest, 1 vol. 25.00
Hill, 7 vols. 2.50

NEW YORK CRIMINAL LAW.
Parker, 6 vols. 4.00
Disney, vol. 1, "Ohio" 1.00
Handy, 2 vols. in 1, "Ohio" 1.00
Rapalje's & Mack's Railway Digest, 8 vols. 12.00

RHODE ISLAND.
Reports, vols. 15 to 28. 28.00

SOUTHERN REPORTER DIGEST, 1 vol. of 1 to 15. 3.00

S. W. REPORTER, vols. 1 to 137, incl.

TEXAS SUPREME COURT.
Full set or up to the S. W., new.

TEXAS CIVIL APPEALS.
36 vols., new; vols. 1 to 12, incl., and 21 second-hand

TEXAS APPEALS, CRIMINAL.
Full set or up to the S. W.; new or second-hand

WISCONSIN.
Reports, 45 vols. and Pinney, 3 vols. to N. W. 70.00
Iowa Reports, 144 vols. and Morris & Green, 5 vols. 175.00
Iowa Digest (McClain) 4 vols., 1908. 20.00

We have a long list of choice second-hand text books and other law books. Send for our second-hand list, and write us for any book wanted, new or second-hand.

VERNON LAW BOOK COMPANY,

Kansas City, Mo.